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Citizens United: Questions and Answers

The Supreme Court's holding in *Citizens United v. FEC* released on January 21, 2010 resolved the narrow issue of whether a corporation may make previously prohibited independent expenditures directly advocating for or against a federal candidate. The opinion, however, generated many questions as to its broader implications and new requirements for compliance. Basic answers to those most-often asked questions are provided below, and we are available to answer questions related to specific situations.

1) Will foreign corporations based outside the U.S. or those with a foreign connection now be able to make independent expenditures?

No. The Supreme Court neither considered nor overruled the still-valid portion of existing law that prohibits a "foreign national" from making a direct or indirect contribution to a campaign for federal, state or local election. A foreign national is defined, in part, as "a partnership, association, **corporation**, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country." 2 U.S.C. § 441e; 22 U.S.C. § 611(b); 11 C.F.R. § 110.20(a)(3) (emphasis added). Foreign nationals are further prohibited from making any "expenditure, independent expenditure, or disbursement" in connection with a federal, state or local election. 11 C.F.R. § 110.20(f).

2) Will U.S. subsidiaries of foreign corporations be exempt?

Yes. The definition of "foreign national" exempts any person that is "not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States." 22 U.S.C. § 611(b)(2). The Federal Election Commission ("FEC") has determined that this exemption includes a U.S. corporation that is a subsidiary of a foreign corporation, so long as the foreign parent does not finance U.S. political activities and no foreign national participates in any decision to make expenditures. Many of the legislative proposals that "respond" to *Citizens United* seek to tighten or close this exemption.

3) Will the application of the law apply equally to labor unions?

Yes. The Court's decision discusses the ban on independent expenditures by corporations and labor unions interchangeably, although it stops short of explicitly invalidating the ban for labor unions (as the facts of the case applied only to corporations). In his concurrence, Chief Justice Roberts stated that "Congress may not prohibit political speech, even if the speaker is a corporation or union." The FEC has announced that it will no longer enforce statutory prohibitions against independent expenditures by either corporations or labor unions.

4) What information must be disclosed by corporations making independent expenditures?

Existing disclosure and disclaimer requirements remain intact after *Citizens United*.

Currently, any entity, including a corporation that spends more than \$10,000 per year on electioneering communications, must file a disclosure statement with the FEC, sometimes within 24 hours of the date of a communication's first public dissemination. That disclosure must state who makes the expenditure, the amount, the election to which the communication was directed, and the names of those entities donating \$1,000 or more to the entity making the disbursements for that communication. Furthermore, a corporation (or any non-candidate funding an electioneering communication) must state at the end of a television or radio advertisement that "*ABC Corporation* is responsible for the content of this advertising" and must do so in a clear, direct way pursuant to certain technical requirements.

Disclosure requirements differ based on the type of independent expenditure; however, most independent expenditures must ultimately be reported to the FEC. The FEC has made clear that corporations and labor unions must continue to report their independent expenditures as before.

Practically speaking, corporations will be required to answer for the content of any independent expenditures. In deciding whether to make this type of independent expenditure, a corporation's board must consider whether it is good business to stand by its political independent expenditures.

5) How is "coordination" defined for the purpose of proving whether an expenditure is truly independent?

Problematically, *Citizens United* places considerable weight on a shaky, unsettled portion of FEC regulations. At the time of the decision, the definition of "coordination" was still under development for determining whether a particular communication is independent, and thus permissible for a corporation to make, or is coordinated, and thus prohibited. On October 8, 2009, the FEC had begun its third round of rulemaking to resolve this precise problem. After the decision, the FEC issued a supplemental notice of rulemaking and sought additional public comment.

As the law now stands, the FEC determines "coordination" for a communication through a multi-prong test determining the source of the payment for the communication, content of the

communication and conduct of those entities behind the communication. The existing definition of "coordination" is a communication "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee or their agents, or a political party committee or its agents."

6) Will corporations be able to deduct political independent expenditures as business expenses?

No. Political expenditures are not currently deductible under the "ordinary and necessary" business expenses, and the Court's decision in *Citizens United* has done nothing to change that longstanding rule.

7) What are possible legislative responses?

In just the short time since the decision, the legislative response to this ruling has been considerable. For instance, one Member of Congress has already introduced a constitutional amendment that would restrict all corporations and labor organizations from making independent expenditures. Another proposal would require a corporation's CEO to appear on an advertisement "approving" its content and declaring the percentage of a corporation's total treasury spent on that independent expenditure.

Members have also discussed a number of less drastic new prohibitions on corporate speech. For instance, some have argued that the traditional ban on independent expenditures be maintained for corporations which employ or retain Washington lobbyists, have a government contract, or receive government subsidy or bailout funds. Also proposed are corporate governance reforms that would require a corporation to first obtain majority shareholder approval before funding independent political speech.

The most likely proposal to gain bipartisan support is a collection of tougher restrictions on "foreign national" political participation through their U.S. subsidiaries.

8) Should corporations with PACs now alter their PAC budgets to plan for expenditures in line with this decision?

No. While this decision clears the way for a corporation to make an *independent* expenditure, such as television or radio advertising, that directly supports or advocates for or against a candidate, a corporation still may not use its general treasury funds to make a *direct contribution* to a candidate or party. The PAC remains the only method by which a corporation, or rather its donor employees and shareholders, may make a contribution to a candidate. Moreover, the corporate connected PAC could become even more relevant as a candidate could be pressured to raise even more “hard money” than ever before to defend themselves against independent expenditure advertising campaigns.

9) When will FEC issue guidance, and why does it matter?

In the wake of the decision, the FEC has already issued public guidance on which parts of existing law it will no longer enforce, begun new rulemakings and extended others, and instructed corporations and labor unions to continue to report independent expenditures as before. Until the FEC issues guidance or rules outlining additional specifics of compliance with the Supreme Court’s ruling, as well as clarifies whether any additional restrictions on disclosure may be considered with regards to how an independent expenditure must be reported, a corporation making such expenditures may be at risk of enforcement action by the FEC.

The FEC may consider such regulations for a lengthy period of time. The FEC is engaged in multiple rulemakings related to a separate court ruling, and it recently reopened public comment on its proposed definition of “coordinated.” As such, it may be several months before the FEC completes any rulemakings required by *Citizens United*. However, increased pressure to have rules in place in advance of the 2010 general election may encourage the FEC to act quickly in resolving uncertainty around its enforcement of *Citizens United*. For instance, on the day of the decision the FEC announced that it would issue guidance in accordance with the decision “as soon as possible.” The FEC Chairman reiterated his intent to issue expedited guidance at a recent Commission meeting.

10) How will corporations likely take advantage of their opportunity to make independent political expenditures?

Just because a corporation may make an independent direct advocacy expenditure doesn’t mean that it should. Since the entity or entities financing independent expenditures must be disclosed, a corporation leading the way against a particular candidate risks alienating a significant block of its potential customer or shareholder base. Moreover, upon the first major corporate-funded public communications airing, media coverage is likely to focus on the corporation’s involvement in the campaign rather than the content of any advocacy.

Therefore, most corporations will probably proceed cautiously. If such independent expenditures are made, groups of corporations within an industry may form coalitions or use existing trade associations to support candidates favorable to policy positions that affect the group as a whole. While corporations that contribute to these expenditures might still be disclosed, this indirect approach can provide sufficient cover such that no single contributing entity receives the bulk of public scrutiny.

Corporations could further lower their profile in such cases by not making contributions specific to a particular expenditure by that third-party corporation. Such independent expenditures can also take the form of advertisements in “under-the-radar” sources, such as ideologically-based talk radio, web-based ads or phone banks. Since state and local laws preventing corporate political expenditures will also likely be repealed as a result of *Citizens United*, small corporations may also become involved in state and local races through regional media.

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